September 2, 1982

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

CASE OF: S[redacted] B[redacted] E[redacted]

This case is before the Board of Appellate Review on appeal from an administrative dete[redacted]ti[redacted]f Department of State that appellant, S[redacted] B[redacted] E[redacted], expatriated himself on July 18, 1980, under the sions of section 349(a)(5) of the Immigration and Nationality Act (hereinafter "the Act") by making a formal renunciation of his nationality before a consular officer of the United States at Rabat, Morocco. 1/

I

Appellant, S[redacted] B[redacted] E[redacted], a native-born [redacted]s citizen, left the United States in the early 1970's, and lived abroad until 1981. In a submission to the Board dated March 16, 1982, appellant stated that after his departure from the United States, "I committed myself to learning to care for the body and became to know the arts of natural healing." He was issued a passport by the American Embassy at Katmandu in 1971, and a second one in 1976 by our Consulate General at Marseille.

1/ Section 349(a)(5) of the Immigration and Nationality Act, 8 U.S.C. 1481, reads:

> Sec. 349. (a) From and after the effective date of this Act a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by --
>
> (5) making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State; . . .

According to appellant's statements of August 6, 1981, and March 16, 1982, made jointly with his wife, [redacted] (appellant in a separate but related appeal) the two lived in India for five years where, in 1977, their son, Shaynallah, was born. As stated in these submissions to the Board, the couple decided to leave India in 1979, and went to Morocco. "Having no resources", appellant wrote, "we hitchhiked, when we could, and walked, when we couldn't, across Asia." It appears that they arrived in Morocco eight months later, in November 1979.

On December 14, 1979, appellant and Ms. [redacted] presented themselves at the United States Con General in Casablanca, Morocco, and asked to renounce their citizenship and that of their son, Shaynallah. They said they had no claim to any other citizenship, and did not wish to be associated with any government. They indicated that their motives for wanting to renounce United States nationality were religious and philosophical, rather than political. After being counselled at length by both the Consul General and Vice Consul regarding the grave effects of their proposed renunciation of citizenship, they deposited their passports with the Consulate General, and departed to await a response to certain procedural queries posed to the Department by the Consulate General, which commented that both appeared to be in possession of their faculties.

Appellant and Ms. McGrath returned to the Consulate General on January 18, 1980, and, again being advised of the serious consequences of renouncing United States citizenship, including the possibility of arrest by local police for being stateless, insisted on drawing up their own joint affidavit in which they stated that they renounced citizenship and severed all ties between themselves and the United States. This affidavit was subscribed to before the American consul, but, not being in the form prescribed by the Secretary of State, was not acteu upon. The Consulate General advised appellant and Ms. McGrath that until it had received a reply to its queries from the Department, it could not proceed further with the process the couple had sought to initiate.

Appellant informed the Consulate General on May 25, 1980, that the family was staying near Rabat: had visited various places in the country; they were "feeling fine"; and asked if there was any additional information for them. The Department meanwhile, on February 8, 1980, had replied

to the Consulate General's earlier inquiry. It instructed the Consulate General to caution appellant and Ms. McGrath again, and to advise them to visit appropriate Moroccan authorities to ascertain precisely what would be their status if they renounced United States citizenship. The Department stated that they might not renounce their infant's citizenship on his behalf, and directed that any signed oaths of renunciation they executed be returned to the Department for review.

E[redacted] wrote the Embassy at Rabat on July 14, 1980, that an encounter with local police regarding his status had led him and Ms. McGrath to wish to complete the process of renunciation of nationality at the Embassy.

Thus, on July 18, 1980, appellant and Ms. McGrath appeared at the Embassy at Rabat, where each took an oath of renunciation before a consular officer and two witnesses in the form prescribed by the Secretary of State. 2/ Each also executed a statement of their understanding of the implications of their act. As instructed, the Vice Consul refused to accept an oath on behalf of the child.

2/ We note, however, that the pre-printed form of the oath executed by appellant and Ms. McGrath recited that they had renounced their citizenship under section 349(a)(6) of the Immigration and Nationality Act. a/ Public Law 95-432 of October 10, 1978, redesignated section 349(a)(6) as paragraph (5). Following approval of PL 95-432, the Department on October 12, 1978, instructed all diplomatic and consular posts to amend the pre-printed form accordingly. Embassy Rabat obviously did not make this change on appellant's oath form.

a/ Section 349(a)(6) of the Act, 8 U.S.C. 1481, reads in part:

> Sec 349. (a). From and after the effective date of this Act a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by --
>
> > (6) making in the United States a formal written renunciation of nationality in such form as may be prescribed by, and before such officer as may be designated by, the Attorney General whenever the United States shall be in a state of war....

In forwarding appellant's oath and statement of understanding to the Department, the Embassy observed that [redacted] had signed only after long consultations at the Consulate General and the Embassy, including one of over an hour with the Deputy Chief of Mission, who as Consul-General at Casablanca, had already advised appellant and Ms. McGrath at length regarding all the implications of renunciation. The Embassy noted that appellant and Ms. McGrath had, however, stressed their wish to be free of wordly ties (such as citizenship), so as better to lead a simple, religiously-centered life.

Subsequently, as instructed by the Department and in accordance with the requirements of section 358 of the Act, the Embassy on September 22, 1980, executed a certificate of loss of nationality in the name of appellant. 3/ The Embassy certified that appellant was born at New York City on May I, 1950; that he acquired the nationality of the United States by virtue of his birth therein: that he executed an oath of renunciation on July 18, 1980; and had thereby expatriated himself under the provisions of section 349(a)(5) of the Immigration and Nationality Act.

3/ Section 358 of the Immigration and Nationality Act, 8 U.S.C. 1501, reads:

> Sec. 358. Whenever a diplomatic or consular officer of the United States has reason to believe that a person while in a foreign state has lost his United States nationality under any provision of part III of this subchapter, or under any provision of chapter IV of the Nationality Act of 1940, as amended, he shall certify the facts upon which such belief is based to the Department of State, in writing, under regulations prescribed by the Secretary of State. If the report of the diplomatic or consular officer is approved by the Secretary of State, a copy of the certificate shall be forwarded to the Attorney General, for his information, and the diplomatic or consular office in which the report was made shall be directed to forward a copy of the certificate to the person to whom it relates.

The Department approved the certificate on October 20, 1980, approval constituting an administrative determination of loss of nationality from which an appeal may be taken to this Board.

On May 19, 1981, or ten months after he had signed the oath of renunciation, appellant was examined by a contract physician of the Consulate General who found him seriously ill with hemorrhagic rectolitis, severe post-hemorrhage anemia, and malnutrition. The physician prescribed treatment by an American gastroentologist, and continuing clinical care. Appellant, Ms. McGrath and their son were evacuated to the United States, apparently in June 1981, under the provisions of section 203(a)(4) of the Immigration and Nationality Act, as qualified immigrants who are the married son or married daughter of citizens of the United States.

On August 6, 1981, while resident in New York State, appellant and Ms. McGrath filed a joint appeal with this Board.

II

In order for expatriation to result from appellant's performance of a statutory expatriating act, it must be established that appellant performed the act voluntarily and in conformity with applicable legal principles. Perkins v. Elg, 307 U.S. 325 (1939).

Appellant does not dispute that he signed an oath renouncing his United States citizenship. Nor does he contend that the oath was not executed in conformity with section 349(a)(5) of the Act. And we find that his renunciation was in the form prescribed by the Secretary of State, despite the fact that the pre-printed form of oath he signed had not been amended to show the correct statutory authority under which he renounced. (See note 2 supra.) In the circumstances of this case, we do not consider the failure of the Embassy to redesignate section 349(a)(6) as 349(a)(5) to be material error. Appellant clearly understood that he was renouncing under section 349(a)(5), and has not contended to the contrary.

The crucial issue in this case is whether or not appellant made a formal renunciation of his United States citizenship voluntarily.

Under section 349(c) of the Act, a person who performs a statutory act of expatriation, is presumed to have done so voluntarily. 4/ This presumption may be rebutted by a preponderance of the evidence showing that the act was not done voluntarily.

Thus, to prevail, appellant must prove, by a preponderance of the evidence, that his act of renunciation was involuntary.

He pleads that his decision to renounce his citizenship was induced by duress, namely, his own "continuously deteriorating" health, and his fear that the family's tourist visas would not be extended, thus forcing them to leave Morocco and travel again to the detriment of the family's health and well-being.

It is well established that proof of duress or involuntariness avoids the effect of the expatriative act, for it is the very essence of expatriation that it be voluntary. Perkins v. Elg, 307 U.S. 325 (1939); Doreau v. Marshall, 170 F. 2d 721 (1948); Nishikawa v. Dulles, 356 U.S. 129 (1958); Afroyim v. Rusk, 387 U.S. 253 (1967); Jolley v Immigration and Naturalization Service, 441 F. 2d 1245 (1971). As the Court of Appeals stated in Jolley, the opportunity to make a decision based upon personal choice is the essence of voluntariness.

4/ Section 349(c) of the Immigration and Nationality Act, 8 U.S.C. 1481, reads:

> (c) Whenever the loss of United States nationality is put in issue in any action or proceeding commenced on or after the enactment of this subsection under, or by virtue of, the provisions of this or any other Act, the burden shall be upon the person or party claiming that such loss occurred, to establish such claim by a preponderance of the evidence. Except as otherwise provided in subsection (b), any person who commits or performs, or who has committed or performed, any act of expatriation under the provisions of this or any other Act shall be presumed to have done so voluntarily, but such presumption may be rebutted upon a showing, by a preponderance of the evidence, that the act or acts committed or performed were not done voluntarily.

In order for the plea of duress to prevail, it must be shown, as stated in Doreau v. Marshall, that there existed "extraordinary circumstances amounting to a true duress" which "forced" a United States citizen to follow a course of action against his fixed will, intent, and efforts to act otherwise. The expression "voluntary act" has been defined as an act proceeding from one's **own** choice or full consent unimpelled by another's influence. Nakashima v. Acheson, 98 F. Supp. **11** (1951). In cases of formal renunciation of nationality, it has been held that evidence **of** a higher degree of duress is required to rebut the presumption of voluntariness. Kuwahara v. Acheson, 96 F. Supp. 38, (1951).

In light of these judicial guidelines, the basic question to be decided by the Board is whether appellant was forced against his will to renounce his United States citizenship and whether he, in an alleged state of deteriorating health and anxiety lest he be forced to leave Morocco, proceeded on the basis of his free will, unimpelled by the influence of others or forces beyond his control.

The relevant inquiry is appellant's conduct at or around the time he performed the allegedly expatriating act. Statements made at some remove from the event are relevant only to the extent that they tend to show his state of mind at the time he performed the act.

As shown by the extensive and carefully prepared records which the Consulate General at Casablanca and the Embassy at Rabat made of their contacts with appellant, at no time before he signed the oath of renunciation on July 18, 1980, did E[redacted] allege that poor health or fear of being compelled to leave Morocco motivated his wish to renounce. Reports filed by both posts beginning in December 1979 and continuing through July 1980 make no mention of ill-health or fear of expulsion from Morocco as appellant's stated reasons for wanting to give up his citizenship. Furthermore, on December 28, 1979, and July 22, 1980, the Consulate General and the Embassy, respectively, reported that the mental condition of both appellant and Ms. McGrath seemed to be within normal limits.

Both the Consulate General and the Embassy informed the Department in September 1981, that none of the officers involved' in' appellant's case could recall him ever having made such arguments. The only contemporaneous reference by appellant to his or his family's health was on May 25, 1980, when in a letter to a consular officer at Casablanca he wrote "we are feeling fine." The subject **of** appellant's health did not therefore arise in this case until ten months after he renounced his citizenship, in May **1981**, when E[redacted] was found tc be seriously ill and was

subsequently evacuated to the United States. We note Consulate General Casablanca's message of June 3, 1981, stated E[redacted] was physically able to depart without requiring a stretcher, and that his wife could act as attendant for the journey.

The reasons appellant gave to U.S. officials in 1979 and 1980 for wanting to divest himself of his citizenship are summarized in a report from Embassy Rabat to the Department dated September 23, 1981. The Embassy observed:

> He /Edelhertz/ felt that he could best practice his-religion and follow his life style if he were unencumbered by worldly ties and constraints. In Morocco he apparently thought he had found a place congenial to his religion, diet and node of life. He could therefore rid himself of mundane connections. There was no further need for travel. God would take care of him.

The Consulate General's report to the Department of September 24, 1981, essentially agreed with that of the Embassy. The Consulate General did, however, note that appellant and Ms. McGrath "believed that their connection with the Moslem faith would prevent immigration problems."

We also note that for seven months appellant consistently pressed his request to renounce his citizenship, despite repeated counsel from both the Consulate General and the Embassy to reflect carefully before taking a step which would leave him (and his wife) stateless. His execution of a home-made affidavit of renunciation of citizenship five months before he legally renounced further indicates single-mindedness of purpose and volition. In all his conduct from December 1979 to the date of his renunciation, appellant manifested a state of mind about giving up his citizenship which leaves us in no doubt that he performed the act voluntarily.

Furthermore, the first point in the statement of understanding executed by appellant read: "I understand: 1. That I have a right to renounce my United States nationality and I have decided voluntarily to exercise that right."

In brief, it is our opinion that appellant was not impelled by others or external forces to abandon his allegiance to the United States. The circumstances in which he found himself could not be considered to constitute such duress as to render his act involuntary. As in Jolley, where plaintiff renounced his citizenship because he did not want to violate the Selective Service law, which he opposed because of the Viet Nam war, E[redacted]' "Hobson's choice" was of his own creation. He had full knowledge of the grave legal consequences of his act and yet insisted on carrying it to conclusion. That he later contended in an ex post facto statement ill-health and circumstances had influenced his "ill-advised request" to renounce his citizenship, suggests that he made a voluntary decision which he now regrets.

We conclude, therefore, that appellant E[redacted] has not sustained his burden of overcoming the statutory presumption of section 349(c) of the Act that he voluntarily made a formal renunciation of his United States citizenship on July 18, 1980.

There remains the question of whether or not appellant also had the intention to relinquish his United States citizenship.

The Supreme Court held in Afroyim v. Rusk, 387 U.S. 253 (1967) that a United States citizen has a constitutional right to remain a citizen "unless he voluntarily relinquishes that citizenship." In Vance v. Terrazas, 444 U.S. 252 (1980) the Supreme Court affirmed Afroyim's emphasis on the requirement that a citizen assent to relinquishment of his citizenship before he can be deemed to have surrendered it, and that the record support a finding that the expatriating act was accompanied by an intent to relinquish United States nationality.

Formal renunciation of United States citizenship in the manner prescribed by law is the most unequivocal and categorical of all expatriating acts and implicitly demonstrates intent on the part of the renunciant to abandon citizenship.

In the'instant case, appellant's intention is vividly manifested in the language of the oath he swore on July 18, 1980, wherein he "unequivocally, absolutely and entirely" renounced his United States citizenship, "together with all rights and privileges and all duties of allegiance and fidelity thereunto pertaining."

In our opinion, the record fully supports a finding that appellant's expatriating act was performed voluntarily and with intent to relinquish his United States citizenship.

III

On consideration of the foregoing and on the basis of the record before the Board, we conclude that appellant, S[redacted] B[redacted]e E[redacted] expatriated himself on July 18, 1980, by making a formal renunciation of his United States citizenship before a consular officer of the United States, in the form prescribed by the Secretary of State. Accordingly, we affirm the Department's administrative determination of October 20, 1980, to that effect.

Alan G. James, Chairman

Warren E. Hewitt, Member

Howard Meyers, Member